Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., ET AL.; LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK; AND AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, ET AL.,

Respondents.

BRIEF OF PETITIONERS AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

WILLIAM H. TOWLE,
Attorney for American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.

BURKE, KERWIN, TOWLE & ANDRIN,
180 North LaSalle Street,
Chicago, Illinois 60601,
(312) 332-5106.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 56

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	5
Statement of the Case	5
Summary of Argument	10
Argument	11
State Action Is Not Involved in the Enforcement of a Warehouseman's Lien	11
If the Court Determines That State Action Is Involved It Should Further Find That in the Merchant-Warehouseman Context the Statute Satisfies Due Process	17
Conclusion	22

Table of Authorities.

Cases.

Adams v. Southern California First National Bank, 492 F. 2d 324 (9th Cir. 1973) 17

American Oil Company v. McMullin, 433 F. 2d 1091 (10th Cir. 1970) 19

Brooks v. Flagg, 553 F. 2d 764, 769 (2nd Cir. 1977) 6, 11, 17

Brunswick Corporation v. J. & P., Inc., 424 F. 2d 100 105 (10th Cir. 1970) 20

Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Company, 239 U. S. 520, 529 (1915) 13

Cox Bakeries of N. D. v. Timm Moving & Storage, 554 F. 2d 356, 358 (8th Cir. 1977) 15, 16, 18

Flores v. Didear, 12 UCC Rep. 168, 489 S. W. 2d 406 (Tex. Civ. App. 1972) 18

Fuentes v. Shevin, 407 U. S. 67 (1972) 17

James v. Pinnix, 495 F. 2d 206 (5th Cir. 1974) 17

Melara v. Kennedy, 541 F. 2d 802, 805 (9th Cir. 1976) 11, 15

Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974) 17, 19

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 18

D. H. Overmyer Co. v. Frick Co., 405 U. S. 174, 187-188 (1972) 18, 20

Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 17, 20

Swarb v. Lennox, 405 U. S. 191 (1972) 20

Statutes.

Alabama—1896 Code, Sec. 4225-4228 12

Arkansas—Act XXX, Laws, 1895 12

California—1851 Stats. c. 12, p. 170 12

Colorado—L. 1874, pp. 305, 306 Sec. 5 12

Connecticut—Laws 1895 Ch. 204, Sec. 1 and 2 12

Florida—Laws 1873 Ch. 1943 12

Georgia—Ga. Code Supp. 1901, Sec. 6585 12

Iowa—Sec. 26, Gen'l. Stat., Ch. 107 of Laws 1873 12

Kentucky—Ky. Stat. 1899, Sec. 4778 12

Maine—Laws 1897, Ch. 304, p. 339 12

Massachusetts—Laws 1887, Ch. 227 Sec. 1 12

Michigan—Consol. Laws 1887, Ch. 127 Sec. 14 12

Minnesota—G. S. 1866, Ch. 19, Sec. 17-21 12

Missouri—Laws 1895, p. 282 12

Nebraska—Laws 1901, Sec. 5346 12

New Jersey—P. L. 1886, p. 181, Sec. 2 12

New York—Ch. 336 (1879), N. Y. Laws 417 11
Ch. 732, N. Y. Laws 1907 14

North Carolina—Laws 1901, p. 908 et seq. 12

North Dakota—Revised Code 1895, Sec. 4195-4197 ..12, 16
Laws 1917, Ch. 250, N. D. Century Code 60-08-32 16

Oregon—Hills Annot. Laws of Oregon 1892, Sec. 3685 .. 12

Rhode Island—General Laws 1896 Ch. 206, Sec. 25 12

South Carolina—Code 1902, Sec. 1725-1728 12

Uniform Commercial Code—Section 9-503 17
Section 7-209 6
Section 7-210 ....3-5, 6, 10, 22

Uniform Warehouse Receipts Act (1906) 13, 14, 15
Vermont—Stat. 1894, Sec. 4859 et seq. 12
Washington—Codes and Stat. of Washington (Ballinger), 1897, Sec. 5963-5966 12
Wisconsin—Rev. Stat. 1898, Sec. 1638-1646 12
Wyoming—Rev. Stat. 1899—Sec. 2847-2850 12

Other Sources.

Handbook of the National Conference of Commissioners on Uniform State Laws, 1920, pp. 25 and 32 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 72-25, 77-37 and 77-42.

FLAGG BROTHERS, INC., ET AL.; LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK; AND AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, ET AL.,

Respondents.

BRIEF OF PETITIONERS AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 553 F. 2d 764 (2d Cir. 1977).

The opinion of the District Court is reported at 404 F. Supp. 1059 (S. D. N. Y. 1975). A prior opinion of the District Court granting motions to intervene is reported at 63 F. R. D. 409 (S. D. N. Y. 1974).

JURISDICTION.

The order of the Court of Appeals was entered on April 7, 1977. Pursuant to Rule 22, petitions for a writ of certiorari were filed within 90 days of that date by Flagg Brothers, Inc. *et al.*, in No. 77-25; Louis J. Lefkowitz, Attorney General of the State of New York in No. 77-37; and American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc. in No. 77-42. Certiorari was granted on October 3, 1977, and the cases were consolidated. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. Constitution, amend. XIV § 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983:

> "Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U. S. C. § 1343:

> "Civil Rights and Elective Franchise.
>
> The districts courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Uniform Commercial Code (New York):

> "§ 7—210. Enforcement of Warehouseman's Lien
>
> (1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
>
> (2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the liens was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

QUESTIONS PRESENTED.

1. Is "state action" present in the enforcement by a warehouseman of his lien for payment of storage charges as provided under Section 7-210 of the Uniform Commercial Code?

2. Does the lien enforcement procedure satisfy due process when applied by a commercial warehouse against the goods of a merchant stored in the ordinary course of his business?

STATEMENT OF THE CASE.

The constitutionality of Section 7-210 of the Uniform Commercial Code is the issue in this case. The case arises under the New York Statute containing these UCC provisions.

Since these provisions govern warehousing in 49 states and the District of Columbia, the American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc. (hereinafter termed AWA and IARW) have a vital interest in the case. Rather than repeat the Statement of Facts peculiar to the controversy between Respondents and Flagg Brothers, Inc., these Petitioners will adopt that set forth in the Brief of Petitioner Flagg Brothers, Inc.

In its original posture the complaint in this case sought a finding that both Section 7-209 and 7-210 were unconstitutional. (A. 7a.) Section 7-209 is the UCC provision which establishes that a warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for storage and specific related charges in relation to the goods.

The decision of the District Court found no state action as to either Section 7-209 or 7-210. In their Brief to the Second Circuit Court of Appeals the plaintiffs apparently abandoned their position that Section 7-209 involves state action. This alteration of position was recognized by the Court of Appeals, *Brooks* v. *Flagg*, 553 F. 2d 764, 769 (2d Cir. 1977.)

Petitioners AWA and IARW are vitally concerned with both the creation of the lien under Section 7-209 and its enforcement under Section 7-210. The reasons for that concern were set forth in the affidavits in opposition to summary judgment. (A. 119a, 123a.) A summary of these facts will assist in a full understanding of the issues as they relate to commerical warehousemen.

The Members of AWA and IARW operate public merchandise warehouses throughout the United States, including the State of New York. Merchandise warehouses provide storage and distribution services for industrial and commercial accounts.

AWA's 478 members, 18 of which are located in the State of New York, account for approximately 1,800,000,000 cubic feet

of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. (A. 124a.) IARW's 218 U. S. member companies, 27 of which are in New York State, account for about 567,000,000 cubic feet of public refrigerated warehouse space, or over 75% of the total in the United States. (A. 119a.)

AWA members typically store dry merchandise while IARW members provide refrigerated storage. The types of commodities handled range from consumer goods such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturer's parts, machinery, chemicals, etc. The typical refrigerated warehouse stores perishable foodstuffs but is also handling an increasing variety of commercial products which require refrigeration, such as chemicals and plastics. (A. 120a, 124a.)

Both the merchandise and refrigerated warehouses are essential parts of the nationwide distribution system of many companies. They receive goods from producers located throughout the country, or the world, and distribute such goods throughout the region surrounding the warehouse. (A. 120a, 125a.)

The services accorded to such goods include break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, coopering, sampling, weighing, loading and unloading of rail cars, and numerous other functions related to the storage and distribution of commercial goods. The refrigerated warehouseman provides freezing services as well as storage at a range of temperatures depending upon the nature of the product. (A. 120a.)

The merchandise warehouseman is typically a small, locally owned and managed company. Of the 1,677 general merchandise warehouses in the United States only 27 had 100 or more employees; only 200 had annual gross revenues of $500,000 or more; and 954 of them were located in areas with less than one million population. (A. 127a-128a.) Of the 749 refrigerated warehouses in the United States, only 142 had annual gross revenues of over $500,000; and only 182 were located in areas

of 1,000,000 or more inhabitants. Of the 89 refrigerated warehouses in New York State, 22 were in New York City, 6 in Buffalo and the remaining 61 were in the smaller communities of New York. (A. 121a.)

These small, locally owned merchandise warehouses deal with large multistate and multinational corporations. They also deal with small, unknown companies located throughout the country and the world.

Merchandise warehouses perform a vital commercial function in facilitating the movement of goods in the stream of commerce. Goods from all over the country, as well as imported goods, are consigned to a local warehouse. The warehouse receives the goods and performs the various break bulk and other commercial services with respect to the goods, and distributes them in customized orders to the various customers of the bailor. Its function is to facilitate the flow of goods from producer to user. Distribution costs are reduced and operating efficiencies are attained. (A. 122a, 127a.)

In providing these vital commercial services the local warehouseman relies upon the existence of the warehouseman's lien. It permits him to assume the risk of receiving goods; storing the goods; performing the necessary break-bulk, packaging and related functions; and shipping the goods. Often he will pay the incoming and outgoing freight charges to facilitate the movement of the goods. (A. 121a-122a, 129a.)

All of these services and expenditures are done in reliance upon the lien. The lien applies to all goods of the bailor in possession of the warehouseman, allowing the release of goods but retaining the security of the lien upon other goods of this bailor in storage. A. 122a, 129a.)

The existence of the lien allows the free flow of goods through the warehouse without the necessity of prepayment procedures or similar strictures which would preclude the movement of goods until charges have been satisfied. The lien allows the local,

generally small warehouseman to deal in the goods of companies located throughout the country and the world without extensive prearrangement for security, credit, prepayment and similar protections. The lien facilitates the movement of goods through the stream of commerce.

Small companies and new companies must minimize their outlay of capital in the distribution and marketing of their goods. At the same time they must expand and open up new markets and sell into new parts of the country. The security of the lien facilitates the warehouseman's handling of the goods of such companies without the prepayment of all contemplated charges. (A. 120a-121a, 128a-129a.)

The sale of goods pursuant to the lien is also a commercial necessity. Space is the foundation of the warehouseman's operation. The space occupied by goods of a defaulting bailor must be expeditiously cleared. It is of little benefit to the warehouseman to assert that if delays occur because of the need to sue on the debt and foreclose on a judgment, that the additional storage charges during the delay might be part of the compensation.

The merchandise warehouse is designed to move goods and earn revenues in handling goods and providing the various break-bulk, packaging and related functions. The opportunities to earn such revenues are lost when space is tied up in the nonproductive storage of the goods of a defaulting bailor.

Further, the value of commercial goods often requires that they be expeditiously sold. Perishable goods are a prime example. If not quickly sold their value is diminished or even lost. Seasonal goods are another example, as are commodities with widely fluctuating market prices. (A. 122a.)

The Court of Appeals recognized that Petitioners AWA and IARW had raised a serious argument that the summary sale provisions, in the context of a merchant storing his goods in the course of his business, may be constitutionally unobjectionable. The Court then suggests that since only Section 7-210(2)

is involved in the instant sale of household goods, the commercial warehousemen can avoid possible adverse determination of the constitutionality of Section 7-210(1) by excluding themselves from the defendant class.

However, Section 7-210(8) of the Uniform Commercial Code allows a warehouseman who has a lien upon goods stored by a merchant in the course of his business to enforce it in accordance with either Section 7-210(1), at private sale, or Section 7-210(2), at public sale.

Thus, the decision of the Circuit Court that Section 7-210(2) involves state action and that the constitutionality of that provision can be separately decided from Section 7-210(1) does not resolve the problem for the commercial warehouseman. This approach ignores the fact that the merchandise or commercial warehouseman relies upon both provisions of the statute. Public sale of a merchants goods by a commercial warehouse is equally as important, if not actually more important than the right to conduct a private sale.

Consequently, it is imperative that this Court, assuming it should find that "state action" exists, address the issue of whether the enforcement of the lien against the goods of a merchant stored in the course of his business is constitutional, recognizing the nature of the parties and the type of goods involved.

SUMMARY OF ARGUMENT.

State action should not be determined on the basis of whether the lien enforcement provisions existed at common law. Instead the history and purposes of the provision must be examined to determine if the state is significantly involved. Similarly, the mere fact that a sheriff conducts an auction to enforce a judgment does not automatically convert the auction provisions of the warehouseman's lien statute into state action. When appropriate consideration is given to the background and purposes of the

statute, as well as the minimal state involvement, it is clear that state action is not involved.

If, however, state action is found to exist, the Court should further assess the purposes and history of the warehouseman's lien provisions as they relate to the bailment by a merchant of his goods in the ordinary course of his business. The UCC provisions satisfy due process when considered in light of the parties involved in such a commercial transaction, the goods being stored, the need for a summary procedure to dispose of such goods, and the reasonable protections for the interests of the merchant.

ARGUMENT.

State Action Is Not Involved in the Enforcement of a Warehouseman's Lien.

The Court of Appeals found state action by focusing too narrowly upon the absence of common law decisions allowing a warehouseman to sell stored goods to enforce his lien. The lack of a common law origin for the statutory right is of small worth in deciding whether state action is involved in the disputed activity. The extent of state involvement must turn upon an analysis of the rights and interests involved, not any mechanical test of whether the rule had evolved under the common law or came from the legislative process.

As noted by the dissent of Judge Holden, the New York legislature enacted provisions allowing a warehouseman to sell bailed goods in 1879. Ch. 336 (1879) N. Y. Laws 417. *Brooks* v. *Flagg, supra* at p. 775. The statute is almost 100 years old. A review of legislation in other states indicates that similar provisions were being enacted at about the same time.

In California the authority of a warehouseman to sell bailed goods was enacted in 1851. 1851 Stats. c. 12, p. 170. *Melara* v. *Kennedy*, 541 F. 2d 802, 805 (9th Cir. 1976). That statute allowed sale after the bailor was three months in arrears.

Other states were enacting similar statutes during the late 1800's. Colorado had such a law in 1874, L. 1874, pp. 305, 306 Sec. 5. It allowed sale of the stored goods at auction, after giving notice to the bailor, if charges were not paid within 90 days. In Oregon, such goods could be sold at auction if three months unpaid storage charges had accrued. Hills Annot. Laws of Oregon, 1892, Sec. 3685. In Missouri, the sale could be made if charges remained unpaid for 60 days. Laws 1895, pp. 282-283.

By 1906, at least 25 states had statutes allowing a warehouseman to sell stored goods to realize upon his lien for storage charges.* The laws generally required a specified period of time to elapse without payment of storage charges prior to a sale of the goods. The period was from 2 to 12 months. The sale was to be by public auction conducted by the warehouseman, although several of the statutes required a justice of the peace or sheriff to inventory the goods and conduct the sale.

The laws provided notice provisions. Usually there were in the form of written notice to the bailor as well as newspaper publication or posting of a public notice of the proposed sale.

In some instances perishable products were accorded different provisions. They could be sold sooner than the prescribed waiting period and the notice provisions were less strict.

* Alabama—1896 Code, Sec. 4225-4228; Arkansas—Act XXX, Laws, 1895; California—1851 Stats. c. 12, p. 170; Colorado—L. 1874, pp. 305, 306 Sec. 5; Connecticut—Laws 1895, Ch. 204, Sec. 1 and 2; Florida—Laws 1873, Ch. 1943; Georgia—Ga. Code Supp. 1901, Sec. 6585; Iowa—Sec. 26, Gen'l. Stat., Ch. 107 of Laws 1873; Kentucky—Ky. Stat. 1899, Sec. 4778; Maine—Laws 1897, Ch. 304, p. 339; Massachusetts—Laws 1887, Ch. 227, Sec. 1; Michigan—Consol. Laws 1887, Ch. 127 Sec. 14; Minnesota—G. S. 1866, Ch. 19, Sec. 17-21; Missouri—Laws 1895, p. 282; Nebraska—Laws 1901, Sec. 5346; New Jersey—P. L. 1886, p. 181, Sec. 2; North Carolina—Laws 1901, p. 908 et seq.; North Dakota—Revised Code 1895, Sec. 4195-4197; Oregon—Hills Annot. Laws of Oregon 1892, Sec. 3685; Rhode Island—General Laws 1896, Ch. 206, Sec. 25; South Carolina—Code 1902, Sec. 1725-1728; Vermont—Stat. 1894, Sec. 4859 et seq.; Washington—Codes and Stat. of Washington (Ballinger), 1897, Sec. 5963-5966; Wisconsin—Rev. Stat. 1898, Sec. 1638-1646; and Wyoming—Rev. Stat. 1899—Sec. 2847-2850.

In 1906, the National Conference of Commissioners on Uniform State Laws adopted the draft of An Act To Make Uniform the Law of Warehouse Receipts.

The principal objective of the Uniform Law was to achieve uniformity in the warehouse receipt provisions which were used as collateral in commercial financing. As was stated in *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Company*, 239 U. S. 520, 529 (1915):

> The cardinal principal of the Act—which has been adopted in many States—is to give effect, within the limits stated, to the mercantile view of documents of title.

The warehouseman's lien and his right to enforce it by notice and sale of the stored goods were included within the proposed Uniform Law.* Clearly, such lien and sale provisions were appro-

* Uniform Warehouse Receipts Act §§ 33-34 (1906):

SEC. 33. SATISFACTION OF LIEN BY SALE. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

(*a*) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(*b*) A brief description of the goods against which the lien exists,

(*c*) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(*d*) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the ware-

(Footnote continued on next page.)

priate to protect the interests of the commercial warehouseman who was issuing the warehouse receipts used as documents of title.

By 1920 a total of 41 states had adopted the Uniform Warehouse Receipts Act, including New York in 1907. Laws 1907

(Footnote continued from preceding page.)
houseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired; or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

SEC. 34. PERISHABLE AND HAZARDOUS GOODS. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without

(Footnote continued on next page)

Ch. 732. Handbook of the National Conference of Commissioners on Uniform State Laws, 1920, pages 25 and 32.

The present provisions governing warehouse receipts and liens were included in the revision of commercial laws promulgated as the UCC. These UCC warehouse provisions are in effect in 49 states and the District of Columbia.

This brief summary of the antecedents of the UCC is designed to show that the New York legislative experience is typical of that involving the development of the warehouseman's lien provisions throughout the country. The majority decision in the Court of Appeals did not give appropriate weight to this legislative background.

The history of this provision shows the development of a reasonable and necessary commercial statute. It is designed to order the relations among the parties to the warehouse arrangement, giving appropriate weight to the interests of all concerned. The involvement of the state, other than in enacting the statute, is nil.

The danger of analyzing whether state action exists by reference to common law rights is further illustrated in *Cox Bakeries of N. D.* v. *Timm Moving & Storage*, 554 F. 2d 356, 358 (8th Cir. 1977). That decision distinguished *Melara* v. *Kennedy*, *supra*, by noting that California had not traditionally required judicial foreclosure of a warehouseman's lien, and the California

(Footnote continued from preceding page.)
advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

SEC. 35. OTHER METHODS OF ENFORCING LIENS. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

statutes had included the right of private sale as far back as 1872 (sic).

North Dakota law, which was involved in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* was said to require proving the lien and the amount of storage charges in a judicial proceeding and foreclosure of any judgment by the sheriff under court supervision, at least until 1967 when the UCC provisions were enacted.*

The decision in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* with respect to the state action issue is not persuasive. It is too narrow a view for a statute that has nationwide applicability. In light of the history and purposes of the warehousemen's statute, this Court should not consider the rationale in *Cox* persuasive as to state action. To do so would cause the same UCC provision to be state action in one state but not in another.

When the statutory provisions are viewed in light of their background, it is readily apparent that the state involvement is minimal. It is also, especially as regards the commercial warehouseman, a reasonable involvement for an appropriate commercial purpose. The purposes of the statute should not be ignored in deciding whether the amount of state involvement raises the disputed private conduct to the level of "state action."

The fact that the sale provisions did not exist at common law is not determinative of the state action question. Similarly the fact that sheriffs normally execute upon judgments by public auction does not convert the auction of warehoused goods into a state function.

In exercising his duties, a sheriff is given a roving commission to discover and sell the assets of the judgment debtor. A warehouseman's lien sale is strictly limited to goods stored and is circumscribed with protections as to the notice to be given the bailor, the place and manner of sale and, in the case of a commercial warehouse, the quantity of goods which can be sold.

* There is some question concerning this statement since the Uniform Warehouse Receipts Act was adopted in North Dakota in 1917, Laws 1917, Ch. 250, N.D. Century Code 60-08-32, and a predecessor statute gave warehousemen the right to sell stored goods after a six month default. Revised Code, N.D., 1895, Sections 4195-4197.

There is a clear distinction between a sheriffs power and that of a warehouseman. See: *James* v. *Pinnix,* 495 F. 2d 206 (5th Cir. 1974) upholding the self-help repossession and sale provisions of Section 9-503 of the UCC, and to the same effect, *Adams* v. *Southern California First National Bank,* 492 F. 2d 324 (9th Cir. 1973).

The authority of a warehouseman to exercise upon the stored goods is not the exercise of a state function in the context of the history of the warehouse laws. The involvement is not sufficiently significant to sustain a decision that "state action" is involved. The Court of Appeals erred on this question and its decision should be reversed.

If the Court Determines That State Action Is Involved It Should Further Find That in the Merchant-Warehouseman Context the Statute Satisfies Due Process.

As the majority opinion of the Court of Appeals recognized the commercial warehouseman stands on a different footing than that of the bailee of household goods. *Brooks* v. *Flagg Brothers, Inc., supra,* at page 774. The statute being constitutionally attacked, however, applies to both.

If the UCC warehouseman's sale provisions constitute state action as regards commercial warehouses, then the Court should, in deciding the due process question, recognize that the decisions regarding consumer transactions such as *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); and *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), should not be extended to the sale by a warehouseman of goods stored by a merchant in the course of his business.

These cases involve a type of property and interest which is not involved in the merchant-warehouseman bailment situation.

Even *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), which extends these cases into the commercial arena, should be limited to the facts of that case. It should not be extended to invalidate the warehouseman's sale of the goods of a merchant stored in the course of his business.

The statute as written contains adequate safeguards to satisfy due process in the commercial setting. Prior notice must be given of the amount due and the proposed sale. A merchant who disputes the amount can reclaim his goods and sue on the contract dispute, or can allow the goods to be sold and sue on the dispute. The warehouseman is not the judge and jury on this issue, as is suggested in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* at pp. 360-361, since the merchant can sue on the contract and r[illegible]r if he is correct. Also, a sale which does not compl[illegible] the statute is void and the owner of the goods may recover the value of the goods in a conversion action. *Flores* v. *Didear,* 12 UCC Rep. 168, 489 S. W. 2d 406 (Tex. Civ. App. 1972).

The relationship among businessmen dealing in a commercial setting is constitutionally different. In *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174, 187-188 (1972), the Court concluded that a cognovit clause is not, *per se,* violative of due process:

> "The facts of this case . . . are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack."

The Court further notes that facts such as the relative bargaining power of the parties, whether the contract is one of adhesion, the benefit received by the debtor, and the defenses which can be asserted by the debtor are salient factors to be considered in the due process equation.

In *Mitchell* v. *W. T. Grant Co., supra,* the Court again specified that the *Fuentes* holding was not an absolute rule. There must be a balancing of the interests of the parties involved. "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well". *Mitchel* v. *W. T. Grant Co., supra,* at page 604.

Not only is a balancing of interest required, but the Court also recognized that the type of property involved and the entire circumstances surrounding the transaction are important to a determination of whether due process requires a hearing.

Applying the standards developed in these recent decisions to the warehouseman's lien, when commercial and industrial products are involved, it is obvious that the lien should be upheld. The parties storing goods in merchandise warehouses are business corporations and merchants. They are knowledgeable concerning commercial practices and deal with the merchandise warehouseman from an arms-length position. The contract is not one of adhesion, and the merchant is, at least, the equal of the warehouseman. Often the bailor in such circumstances is a nationwide company with far greater resources than the warehouseman's.

The goods so stored are those raw materials and finished products dealt with by the merchant in the course of its business. They are not personal items of property used by individuals. The products are moving in the stream of commerce. The creation of the lien or its execution under the statute does not deprive an individual of any necessaries or similar specialized property that has been accorded due process protection.

The authority to sell is limited to the goods stored with the warehouseman. There is no question of a power to seize and sell goods which are not the very ones involved in the storage. The sale power is limited and appropriately protected in the circumstances.

Other courts have distinguished between the commercial situation and the consumer cases. In *American Oil Company* v.

McMullin, 433 F. 2d 1091 (10th Cir. 1970), the plaintiff sought damages for money advanced to and property wrongfully converted by defendant in his lease and operation of a service station and cafe. The court rejected defendant's argument that a garnishment and attachment of his property were precluded by *Sniadach, supra,* stating:

> "We do not think that *Sniadach* was intended to preclude all attachments and garnishments merely because some hardship may result". 433 F. 2d at page 1096.

In *Brunswick Corporation* v. *J. & P., Inc.,* 424 F. 2d 100, 105 (10th Cir. 1970), bowling equipment sold under a conditional sales agreement was replevied and sold, after notice to the purchaser but before any hearing, and prior to any judgment in the replevin action. The court refused to find the taking and sale unconstitutional on the basis of *Sniadach, supra,* recognizing the distinction between the property and interests involved.

In *Swarb* v. *Lennox,* 405 U. S. 191 (1972), a companion case to *Overmyer, supra,* involving Pennsylvania's cognovit provisions, the Court specifically refused to rule that the statute was unconstitutional on its face. The circumstances surrounding the execution of the cognovit must be examined to determine whether the debtor effectively waived rights he would otherwise have possessed if there had been no cognovit provision.

The Court should specially find that the involved statute is not unconstitutional on its face and that the enforcement of the lien against a merchant warehousing goods stored in the course of its business is constitutional, recognizing the nature of the parties, the type of goods involved and the circumstances surrounding the transaction.

Not only is such a conclusion consonant with due process precepts, but it also recognizes the commercial importance of the warehouseman's lien. The lien plays an important part in facilitating the free flow of commerce. Merchandise is stored,

transportation charges advanced, and work done to the goods on the basis of the possessory lien. The credit risk of an individual warehouseman dealing with corporations located throughout the world is minimized by the lien. Absent the lien, prepayment procedures, and other restrictive policies would be required, all of which would merely raise the ultimate cost of consumer goods.

The lien, existing along with a carrier's lien since the early days of the common law, does not violate due process and neither does the enforcement provisions.

The products stored by merchandise warehouses are not the type of property that requires the specialized protection of a judicial hearing prior to sale. They are goods stored by merchants in the course of their business.

The decisions have not treated such goods as the type of specialized property that requires a hearing prior to sale. They have, instead, recognized a distinction as to such commercial property in the procedures which will satisfy due process.

When businessmen are dealing with each other under well recognized commercial practices, the requirements of due process need not warrant the careful protection circumscribing the dealings between a businessman and an uninformed consumer who has no bargaining power and little familiarity with legal procedures.

The sale provisions have existed for many years. The provisions now have nation-wide applicability, having been adopted in all of the States except Louisiana. They exist as a uniform standard for businessmen warehousing their goods throughout the United States. Such uniformity is important inasmuch as most goods warehoused in merchandise warehouses are those distributed nationally.

If the businessman does not want the goods sold, he can pay the charges and sue if there is a dispute over the amount. In commercial practice such a requirement does not violate due

process, but is a reasonable accommodation among competing interests. It is not so oppressive, recognizing the type of goods and the parties involved, as to require a judicial hearing prior to sale.

The statute embodies legitimate commercial objectives, provides reasonable protection of the competing interests in light of the property and persons involved, and should not be found to violate due process. Neither on its face nor in its implementation in the commercial setting is more required by due process than that which is set forth in the statute.

CONCLUSION.

This Court should reverse the opinion of the Second Circuit Court of Appeals and should remand for dismissal of the complaint because of a failure to show sufficient state involvement in the enforcement of the warehouseman's lien provision of Section 7-210 of the Uniform Commercial Code.

If, however, this Court should find federal jurisdiction, it should hold that the warehouseman's lien provisions of Section 7-210 do not violate due process in the circumstances of a merchant storing goods in the course of his business.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

By: .....
WILLIAM H. TOWLE,
Their Attorney.

BURKE, KERWIN, TOWLE & ANDRIN,
180 North LaSalle Street,
Chicago, Illinois 60601,
(312) 332-5106.